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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,
Petitioners,

v.

CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment right to freedom of religion encompasses the right to operate a school on church property to further the church's ministry such that government-imposed restrictions on the operation of the church school must be subject to a balancing test between the infringement of fundamental rights occasioned by the restrictions and the government's interest in imposing the restrictions?

2. Whether parental rights to direct the education of their children are necessarily subordinate to a local zoning ordinance enacted to control noise and traffic?

3. Whether it is an abuse of discretion for a federal appellate court to refuse to consider important First and Fourteenth Amendment issues and to allow the district court to summarily dispose of such issues without findings of fact and a thorough discussion of the legal principles applied?

PARTIES BELOW

The parties in the action below were the following:

1. plaintiffs-appellants—First Assembly of God Church, an unincorporated church located in Alexandria, Virginia; * Gilbert and Cheryl Colón, in their personal capacity and on behalf of their child, Gilbert Colón, Jr.; Donald and Dorothy Bass, in their personal capacity and on behalf of their children, Scott and Philip Bass; Meda Nalley in her personal capacity and on behalf of her child, Natalie Nalley; Harry and Mary Lou Wolfkill, in their personal capacity and on behalf of their child, Patrick Wolfkill; David and Shirley Rose, in their per-

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* First Assembly of God Church is affiliated with the General Council of the Assemblies of God, a national religious organization headquartered in Springfield, Missouri.

sonal capacity and on behalf of their child, Bonnie Rose; Ramon and Mary Botello, in their personal capacity and on behalf of their child, David Botello; Peter and Mary Myers, in their personal capacity and on behalf of their child, Gretchen Myers; Lloyd and Marilyn Sigafoo, in their personal capacity and on behalf of their child, Julie Sigafoo; Fred and Sandra Laird, in their personal capacity and on behalf of their child, Scott Laird; Thomas and Edwina Gulbronson, in their personal capacity and on behalf of their child, Paul Gulbronson; and Joyce Dailey, in her personal capacity and on behalf of her child, Eileen Dailey.

2. defendants-appellees—the City of Alexandria, Virginia, and all of its agencies; Charles E. Beatley, Jr., Mayor of Alexandria, Virginia; James P. Moran, Jr., Vice Mayor; and Donald C. Casey, Lionel R. Hope, Margaret B. Inman, Carlyle C. Ring, Jr., and Patricia S. Ticer, Members of the City Council.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, First Assembly of God Church and its named adherents, respectfully request that this Court issue a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit's decision which is challenged here allows a local zoning ordinance to severely impact fundamental constitutional rights without any balancing of competing government interests. This holding not only contradicts the rulings of this Court, but also represents an extreme departure from the usual course of judicial proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals in this case is not officially reported. The Fourth Circuit's unpublished

opinion, dated June 22, 1984, is reprinted in the appendix to this petition. Petitioners' Appendix (App.) 1a.[1]

The opinion and order of the District Court in this case are also not officially reported. The federal judge issued his opinion from the bench on May 31, 1983; the written order was issued that same day. The transcript of the District Court judge's oral opinion and his written order are reprinted in the appendix. Petitioners' App. 7a, 11a.

JURISDICTION

The per curiam opinion and judgment of the Court of Appeals was issued on June 22, 1984. No rehearing was sought in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional validity of restrictions imposed by the City of Alexandria on the operation of a school by the First Assembly of God Church (hereinafter referred to as "First Assembly" or "the Church"). Alexandria City ordinances require private schools, but not public schools, to obtain special use permits for operation in a residential zone. These ordinances (Alexandria City Code §§ 7-6-12(a)(9), 7-6-13(a)(1), and 7-6-14(a)(1)) and the standards for issuing a special use permit (Alexandria City Code § 7-6-192(5)) are set forth in the appendix. Petitioners' App. 12a. The particular conditions imposed by the City of Alexandria on the special use permit sought by First Assembly for the operation of its school are also included in the appendix. Petitioners' App. 28a.

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[1] All of the references cited in this petition may be found in the record and are available under Supreme Court Rule No. 19.1. In addition, certain references are also included in the appendix to this petition, as indicated.

Two constitutional questions are raised in this case. The first is whether the operation of a school by a church in the furtherance of its ministry is a protected religious exercise which may not be unreasonably burdened. The governing provision of the United States Constitution on the issue of freedom of religion is the First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The second constitutional question is whether a government can interfere with parents' rights to direct the education of their children simply by enacting a zoning ordinance which attempts to further an alleged governmental purpose. This parental right is considered an important element of "liberty" which is preserved in Section 1 of the Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

History of the First Assembly of God's Educational Facility

The First Assembly of God Church is located at 700 West Braddock Road in Alexandria, Virginia. The Church owns 5.2 acres of land at this site. The Church property is zoned as an "R-8" residential area; the surrounding neighborhood is zoned as an "R-8" or "R-12" residential area and contains mostly single family dwellings.

The original Church building was approved by the City of Alexandria Planning Commission in 1963, and was dedicated in 1965. In 1973, the planning commission

approved a 14,850 square foot addition to the existing Church building to be used as an educational facility. The educational wing was built to accommodate 450 students and was completed in 1975. It has 42 classrooms and is currently used for the Church's educational ministry on Sunday mornings and Wednesday evenings. The entire Church facility, including the education building, has been and is now in full compliance with all health, safety, and fire regulations and codes of the City of Alexandria and the Commonwealth of Virginia.

The City of Alexandria permits homes, churches, and public schools in a residential area. Private schools, including those operated by religious organizations, must obtain a special use permit (SUP) from the city before they can operate in a residential zone. Petitioners' App. 12a.

In 1975, the Church sought to obtain an SUP for the operation of a school for 350 children, ages 3 through 9, in its educational facility. This application was withdrawn in the face of neighborhood opposition. The Church submitted a similar application for an SUP in 1976, after attempting to resolve the community concerns; this application was also withdrawn for the same reason.

In 1982, after careful deliberation on its obligation to educate the children of its followers in the faith and desiring to more fully utilize its educational building, First Assembly again applied to the City of Alexandria Planning Commission for an SUP for the operation of a school "to extend [the Church's] weekend teaching ministries to a Monday through Friday teaching ministry for the children in ages 2 years through twelfth grade." Petitioners' App. 14a.[2] The application sought permis-

[2] First Assembly filed its application on April 30, 1982, and supplemental information on May 10, 1982. Only the application is reprinted in the appendix.

sion for 350 students to attend the Church's school. *Id.* at 17a.

The Church's facilities for its weekday educational ministry were inspected and approved by the City of Alexandria Department of Transportation and Environmental Services. Fire, health, plumbing, electrical, and building and mechanical inspections were also made by the city. Petitioners' App. 22a-23a. The planning commission staff recommended approval of the SUP, subject to eight conditions. *Id.* at 19a-20a. Despite the staff's recommendation, the planning commission voted on July 6, 1982 to recommend to the Alexandria City Council that the SUP application be denied. Petitioners' App. 27a. The reasons given by the planning commission were:

> "The Commission felt that this was not an ordinary day school or nursery but a full private school. The Commission stated concern for lack of space as well as noise and traffic." *Id.*

The city council held a public meeting on September 18, 1982 to determine whether First Assembly's SUP application should be granted. The Church's application was opposed at the meeting by individual Alexandria residents and by a representative of the North Ridge Civic Association. After an in-depth examination of the Church's ministry, the school's proposed curriculum, its proposed playground facilities, transportation of the students, and anticipated noise and traffic problems, the city council unanimously approved the SUP requested by the Church. *See generally* Transcript of Proceedings of the City Council, September 18, 1982, Vol. I at 1-46 and Vol. II at 1-73. The SUP, however, was subject to 12 conditions:

(1) that total enrollment be limited to a maximum of 75 students (grade pre-school to 9th grade);

(2) that a maximum of 25 children be allowed outside at any one time for playground activities;

(3) that the applicant obtain a license from the Virginia Department of Welfare and Institutions for the care of those pre-school students under the State's jurisdiction prior to the operation of the school;

(4) that the permit be granted for a one-year trial period from commencement of the school operation and that the permit be reviewed at the end of that time by the planning commission and city council;

(5) that the driveway accesses to the school be one-way in at the west driveway, and one-way exit at the east driveway, the city to maintain signing within the public right-of-way and the school to place and maintain the signing on the private property;

(6) that positively no pick-up or delivery of persons or materials will be made from West Braddock Road;

(7) that all persons and materials will be delivered to the school or church from the interior of the property, off of the public right-of-way;

(8) that the applicant will grant and dedicate emergency vehicle easements over existing driveways;

(9) that a fence be installed, subject to approval of the Department of Transportation and Environmental Services and the Planning Department; it to be an 8 foot high chain link fence with redwood slats with evergreen trees, planted at intervals not to exceed 10 feet (to be white pine or similar trees); to be installed within 90 days from the date of approval of the SUP;

(10) that a Certificate of Occupancy be obtained before the school opens, and this to include the fire alarm system;

(11) that play facilities that are noise generators be excluded, including football and basketball, limiting play activities to those that generate little or no noise;

(12) that the school make maximum use of car-pooling to transport students. Petitioners' App. 28a-29a.[3]

After complying with most of the conditions, the Church began the operation of its school on September 28, 1982, with 69 students in grades pre-school through 8th grade.[4] The 23 students who had enrolled in First Assembly's school for 9th through 12th grades were bussed to a Christian school in another county.

On January 3, 1983, after the commencement of this litigation, and based upon a sincere religious belief that the high school students should be taught at First As-

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[3] Some of the conditions imposed by the city council were based on amendments to the application which were made orally by counsel for First Assembly at the city council meeting on September 18, 1982. In an effort to induce favorable action, counsel indicated at that meeting the Church's willingness to limit its enrollment for the first year to the 98 students (pre-school through 12th grade) who were expected to apply to the school, to construct "a combination shrubbery and privacy fence" on the border of the church's property within one year, and to arrange with parents a car-pooling scheme for the transportation of the students. *See* Transcript of Proceedings of the City Council, September 18, 1982, at 3-7. The city council did not adopt the amendments made by the Church at the public meeting. In fact, it imposed conditions which were materially different in number and scope.

[4] Before the school started, the Church made driveway accesses one way in each direction (Condition No. 5), dedicated emergency vehicle easements (Condition No. 8), and obtained a certificate of occupancy (Condition No. 10). The Church also sought to comply with Condition Nos. 6 and 7 regarding pick-ups and deliveries from church property. Although Condition No. 3 required First Assembly to obtain a license for the care of pre-school students from the Virginia Department of Welfare and Institutions, Virginia exempts child care centers operated by religious institutions from the licensing requirement. *See* Code of Virginia § 63.1-196.1 (1980).

sembly's church school, the Church discontinued the bussing of these students and began teaching high school classes at its educational facility, contrary to Condition No. 1. Further, although the Church had attempted to negotiate with the city regarding the fence, no fence was constructed and the 90-day period provided for in Condition No. 9 lapsed on December 18, 1982.

A public meeting was held on January 25, 1983, after notice to the Church, on the question of the Church's compliance with its SUP. At that meeting, the Church stated that it was contesting the constitutionality of the SUP conditions and that it was not in compliance with Condition Nos. 1 and 9 regarding the teaching of high school students and the construction of a fence. The city council voted unanimously on that date to revoke the Church's permit, effective February 21, 1983. *See* Proceedings of City Council Meeting, January 25, 1983.

The Proceedings Below and the Basis for Federal Jurisdiction

On November 22, 1982, First Assembly filed a complaint in the United States District Court for the Eastern District of Virginia, asserting, among other things, that certain of the conditions imposed on the Church violated its rights under the United States Constitution and under 42 U.S.C. § 1983. The City of Alexandria filed a counterclaim on February 28, 1983, seeking an order permanently enjoining the Church from operating a private school without a permit.

On March 23, 1983, the City of Alexandria filed a motion for summary judgment, arguing that, as a matter of law, it should prevail on the claims raised by the Church and on its counterclaim. In response, First Assembly made a number of factual assertions in support of its constitutional claims. Citing testimony from depositions and affidavits, the Church asserted that the operation of a school in association with the Church was based

on a fundamental tenet of its faith, that some parents felt that they would be violating the tenets of their religion by not sending their children to a First Assembly school located on the Church site, and that other private schools located on similar parcels of property were permitted to operate with fewer and less restrictive conditions.[5] In addition, the Church stated that the conditions severely impacted the Church's ability to engage in its ministry and parents' ability to choose an appropriate education for their children by unreasonably limiting the numbers and ages of students who could attend the school, severely restricting the activities of those who did attend, and making the school unduly expensive to operate.[6] Finally, because there were disputed factual issues, the Church argued that summary judgment was not appropriate. *See generally* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, dated April 11, 1983.

Despite the fact that, for the purposes of deciding the motion for summary judgment, all factual inferences were to be taken in favor of the Church, the District Court judge ruled orally on May 31, 1983 that "there is no violation of plaintiffs' constitutional rights." Petitioners' App. 8a. Essentially rejecting First Assembly's factual assertions, the judge granted the city's motion for summary judgment, entered judgment on the complaint in the city's favor, and permanently enjoined the Church

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[5] The Church submitted an affidavit from a professional city planner who stated, among other things, that no other school in the city was subject to prohibitions on playground activities during normal school hours.

[6] For example, the cost of constructing the fence around the entire 5.2 acre facility as required by the city was $30,000, not including the shrubbery. In addition, the parents of the 75 children permitted to attend the school were forced to pay the fixed costs of a school which could comfortably accommodate the 350 children requested by the Church.

from operating a school without an SUP. *Id.* at 11a. The enforcement of the court's order was stayed until June 17, 1983, to allow the school to complete its yearly schedule. *Id.*

First Assembly appealed the District Court decision to the United States Court of Appeals for the Fourth Circuit on June 29, 1983.[7] On June 22, 1984, the panel issued a per curiam decision affirming the lower court. Petitioners' App. 1a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with established case law regarding the protection of religious freedoms under the First Amendment and the significance of parents' rights with respect to the education, particularly the religious education, of their children under the Fourteenth Amendment. That decision also disregards the importance which this Court has attached to these constitutional guarantees. Thus, while the facts of this case are specific to the First Assembly of God Church, the issues involved are national in scope.

For example, virtually every religious denomination recognizes, as one of its major tenets, an obligation to teach others, especially children, in that faith. Similarly, many parents, for a variety of reasons, seek private schools and private religious schools in which to educate their children. The Fourth Circuit, however, has significantly restricted the ability of churches and parents to pursue these constitutionally protected rights, with no consideration of whether the restrictions are justified. In doing so, it has essentially ignored the legal principles established by this Court with regard to these fundamental religious and liberty interests.

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[7] On August 31, 1983, the Church sought from the District Court a stay pending its appeal; the application for a stay was denied on September 9, 1983.

Moreover, the Court of Appeals and the District Court ignored factual assertions made by First Assembly regarding violations of its rights under the First and Fourteenth Amendments, including the City of Alexandria's excessive entanglement with the activities of the First Assembly of God Church and the city's arbitrary and capricious application of its SUP requirement to the Church's school. The lower courts' dismissal of these issues on summary judgment, without consideration of First Assembly's factual arguments, constitutes an abuse of discretion and warrants this Court's exercise of its supervisory powers.

For these reasons, this petition for a writ of certiorari should be granted.

I. THE FOURTH CIRCUIT'S DECISION, WHICH ACCORDS NO WEIGHT TO THE CHURCH'S FUNDAMENTAL RIGHTS, IS CONTRARY TO THE RULINGS OF THIS COURT AND OF OTHER CIRCUIT COURTS

A. Virtually Every Court Which Has Examined the Issue Has Used a Balancing Test To Weigh the Burden on Religious Freedom Against the Government's Interest in Imposing the Burden

The First Amendment to the United States Constitution guarantees to all citizens the "free exercise" of religion. This guarantee of religious freedom has been made applicable to the states through the due process clause of the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) and has been deemed to be a "fundamental right" (*see Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937)).

The right to freedom of religion encompasses not only the right to believe, but also the right to act on that belief. *Cantwell*, 310 U.S. at 303-304. Although the right to hold any religious (or non-religious) belief is absolute, the right to engage in religious practices or conduct in

furtherance of that belief may be subject to reasonable time, place, and manner restrictions in order to "safeguard the peace, good order and comfort of the community . . . ." *Id.* at 304. However, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.*

Determining when a governmental regulation does "unduly infringe the protected freedom" is not an easy task. It involves a balancing of the burden on religious activities with the government's interest in enforcing the regulation. In addition, this determination includes a consideration of whether the regulation is the least restrictive means which can be used to obtain the governmental goal. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

The balancing test has been used by this Court in virtually every case involving a claim of infringement on religion from *Cantwell, supra*, to *Bob Jones University v. United States*, ——, U.S. ——, 103 S. Ct. 2017 (1983). Similarly, the Courts of Appeals which have looked at the infringement of religion issues have also employed this balancing test. *See Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *appeal docketed*, No. 83-1940 (May 25, 1984); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 72 (1983); *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, 482 F. Supp. 968 (D.N.J. 1980), *aff'd*, 654 F.2d 868 (3d Cir. 1981); *Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 490 (1979).

To begin this balancing test, courts have looked to the religious activity itself. Only religious conduct flowing from a religious belief is protected by the First Amendment. *Thomas*, 450 U.S. at 713. The resolution of the

question of what is a "religious" belief or practice, however, is *not* to be based "upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. While courts may examine the sincerity with which religious beliefs are held or the "centrality" of the religious conduct to the believer's faith, courts may not consider the truth or validity of the religious beliefs themselves. *See id.* at 715-16.

After determining that a religious activity has in fact been negatively affected by a governmental regulation, courts next examine the extent of the burden placed on the activity. Where the regulation essentially prohibits the religious practice, courts have found an infringement on religious freedom. Whether this infringement is allowed to stand depends on the government's interest in enforcing its regulation. *Compare Thomas*, 450 U.S. 707 (denying unemployment benefits to a person who terminated his job, because of his religious beliefs, forced him to choose between First Amendment rights and participation in an otherwise available public program); *and Wisconsin v. Yoder*, 406 U.S. 205 (1972) (forcing Amish children to attend high school threatened the continued existence of the Amish faith and way of life), *with Gillette v. United States*, 401 U.S. 437 (1971) (government's interest in establishing a military force outweighs a person's objection, on religious grounds, to participation in a particular war); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (government's interest in having a day of universal "community tranquillity" outweighs the economic harm to an individual who must close his business on Saturday in conformance with his religious beliefs *and* on Sunday in conformance with state law); *and Prince v. Massachusetts*, 321 U.S. 158 (1944) (state's interest in enforcing child labor laws outweighs guardian's rights to have her charge engage in religious activities).

Courts have also reviewed statutes which adversely affect a religious practice, but which do not go so far as to prohibit the practice entirely. In such a case, courts have continued to weigh the burden imposed against the governmental interest. Even the imposition of an incidental burden on religious activities requires the government to justify its actions. For example, this Court in *Johnson v. Robison* reviewed the claim that the denial of veterans' educational benefits to conscientious objectors who performed alternative civilian service was a violation of those individuals' free exercise rights. The Court found that "[t]he withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if indeed, any burden exists at all. [Footnote omitted]." 415 U.S. 361, 385 (1974). Balancing the "incidental burden" against the goverment's "substantial interest in raising and supporting armies," the Court rejected the claim of unconstitutional infringement. *Id.* at 385-86.

Similarly, the Eleventh Circuit in *Grosz v. City of Miami Beach* found that an ordinance which prohibited a residence from being used for religious services imposed only "some degree of burden" on free exercise rights. 721 F.2d at 739. The court went on to balance "the cost to the government of altering its activity to allow the religious practice to continue unimpeded against the cost to the religious interest imposed by the government action." *Id.* at 738. This balancing test was characterized as "the path of least impairment of constitutional values." *Id.* at 734. Summing up its view of the balancing test, the court stated:

> "In our examination of the methods by which burdens on government and religion are calculated two principles surfaced that merit repetition here. The first flows from the least restrictive means test. When the government can as easily achieve its policy objective without burdening religious conduct, the burden on the government is zero and the scale necessarily reads against upholding the government ac-

> tion. Similarly, the second principle operates when the burden on religion is zero. When the burden imposed by the government rests on conduct rooted only in secular philosophy or personal preference, the scale always reads in favor of upholding the government action." *Id.* at 737.

See also Valencia v. Blue Hen Conference, 476 F. Supp. 809, 825 (D. Del. 1979), *aff'd without opinion*, 615 F.2d 1355 (3d Cir. 1980) ("the severity of the burden on free exercise rights is an important factor to be considered in the *ad hoc* balancing process").

In sum, this First Amendment balancing scheme requires a court to weigh the burden imposed on a religious activity against the government's interest in or justification for its enforcement of the regulation which results in the burden. Balancing those interests is necessarily an "*ad hoc*" determination which requires a court to look at the facts of each case. *See Grosz*, 721 F.2d at 737-38. In this case, however, the Court of Appeals not only ignored the facts as alleged by the Church, but also failed to weigh the rights of the Church against the governmental goal alleged by the city.

B. The Operation of a School by a Church in the Furtherance of Its Ministry Is a Protected Religious Activity Which May Not Be Unreasonably Restricted

The Court of Appeals in this case did not accept First Assembly's assertions regarding the importance of its school to its ministry. Apart from the fact that the Church was entitled to have the facts it alleged taken as true for purposes of the summary judgment motion, the court's decision also failed to recognize that the operation of a school in association with a religious organization has long been held to be a religious activity protected under the First Amendment. Most recently, this Court in *Bob Jones University v. United States* acknow-

ledged that a religious university had free exercise rights which could be burdened only upon a showing that the government's interest in imposing the burden was overriding. 103 S. Ct. at 2034-35. The Courts of Appeals for the Third and Seventh Circuits have also held that burdens on schools operated by churches involve freedom of religion considerations. *See New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, 482 F. Supp. at 978-79, *aff'd*, 654 F.2d 868 (3d Cir. 1981) and *Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112.

Similarly, in cases involving aid to religious schools, courts have also found that schools operated by churches are closely associated with the religious teachings of that church. In *Lemon v. Kurtzman*, this Court found that "parochial schools constituted an integral part of the religious mission of the Catholic Church." 403 U.S. 602, 616 (1971). *See also Catholic Bishop*, 559 F.2d at 1119 (institutions which are "substantially religious" so as to be ineligible for federal financial assistance under the Establishment Clause are also to be considered integral parts of religious organizations for free exercise purposes).

Clearly, a school operated by a church in the furtherance of its ministry is an important aspect of that church. The school which First Assembly seeks to operate is no exception. The Pastor of the Church testified in a deposition that it is a fundamental tenet of the First Assembly of God Church that the children of its followers attend First Assembly's school. Deposition of Pastor Thomas F. Gulbronson at 61-65. Parents who were deposed stated that it is a basic part of their religious belief that their children attend a First Assembly or other Christian school. *See, e.g.*, Deposition of Pastor Gulbronson at 61-62; Deposition of Ramon J. Botello at 31-32; Deposition of Lloyd Sigafoo at 17; Deposition of Harry Wolfkill at 17-18; and Deposition of Donald A. Bass at 19. Many

parents also testified that it was part of their fundamental belief that First Assembly's school be located at the site of the Church itself. *See* Deposition of Pastor Gulbronson at 165-66; Deposition of Cheryl Colón at 27-28; and Deposition of Shirley Rose at 36-37.[8]

As with virtually every other religious denomination, First Assembly and members of its congregation believe that the operation of a school by the Church and the teaching of their children in that school is a fundamental element of their faith. When, as with First Assembly, the operation of a school is so closely related to the function of the church, the imposition of conditions on the operation of such a school is a burden on the free exercise of religion. Whether these conditions pose too much of a burden on free exercise rights is a determination for a court to make, after considering both the extent of the infringement and the government's interest in imposing the conditions. The Court of Appeals in this case failed to make such a determination.

C. The Fourth Circuit Ignored the Precedent Established in this Court and the Reasoning Used in Other Courts of Appeals When It Failed To Adequately Consider the Church's First Amendment Claims

As discussed above, when faced with a claim of infringement on free exercise rights, this Court and several Courts of Appeals have employed a balancing test, weighing the burden on religious activity against the government's interest in enforcing its regulation. In reviewing First Assembly's free exercise claims, however, the Fourth Circuit ignored this unbroken line of case law.

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[8] As noted above, for purposes of the city's summary judgment motion, these facts should have been taken as true.

In its decision rejecting First Assembly's claims of infringement, the court stated its view of the law in a footnote:

> "Burdens on religious freedoms have been categorized as either restricting beliefs or regulating conduct. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Here, the City has neither attacked appellants' religious beliefs nor sought to regulate their conduct and, therefore, cannot be said to have burdened appellants' religious freedom." Petitioners' App. 5a.

In essence, the court assumed that the operation of a religious school did not raise any First Amendment issues. Thus, it did not consider, as the Church had asserted, whether the operation of a weekday ministry was a religious practice, based upon a sincere religious belief, which was therefore entitled to constitutional protection. Similarly, the court did not consider the burdens placed on this religious practice by the City of Alexandria's SUP. Finally, the court did not consider the interest asserted by the city in imposing the conditions on the operation of the school, whether the conditions actually furthered that interest, or whether there might have been other, less restrictive means of satisfying that interest.[9] The court's decision which fails to balance the First Amendment rights of the Church against the governmental interest in enforcing its SUP conditions was erroneous and should be reversed.

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[9] Any interest asserted by the city is suspect in light of the fact that only private schools, not public schools, must obtain an SUP in order to operate. *See* Petitioners' App. 12a. Thus, in the City of Alexandria, public schools are not subject to the same noise and traffic concerns as are private schools. For example, no other school in the city is subject to restrictions on playground activities during normal school hours. This, at a minimum, raises equal protection considerations.

II. BY ITS DECISION, THE FOURTH CIRCUIT HAS ALLOWED THE APPLICATION OF A LOCAL ZONING ORDINANCE TO UNREASONABLY RESTRICT THE RIGHTS OF PARENTS TO SELECT A PRIVATE SCHOOL FOR THEIR CHILDREN—A RIGHT WHICH THIS COURT HAS STATED IS FUNDAMENTAL

The Court of Appeals, following the lead of the District Court, considered First Assembly's complaint as nothing more than an ordinary challenge to a zoning ordinance on property rights grounds. Finding that the imposition of the conditions on the operation of First Assembly's school were "substantially related to the preservation of important municipal objectives, such as traffic and road safety, fire prevention and noise," the Court of Appeals upheld those conditions under the standard of *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 395 (1926) (a zoning ordinance is valid unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"). Petitioners' App. 5a.

In addition to according no weight to the Church's free exercise rights in relation to the city's zoning ordinance, the Court of Appeals ignored the fact that the ordinance effectively stifled the rights of parents to send their school-age children to a private school, particularly a school associated with their church. Like free exercise rights, however, such parental rights are fundamental and any infringement upon them must be fully justified.

A. This Court Has Consistently Upheld the Rights of Parents To Control the Education and Religious Upbringing of Their Children

The rights of parents to direct the education of their children was first enunciated in *Meyer v. Nebraska*, 262 U.S. 390 (1923). In that case, a parochial school teacher was convicted of violating a Nebraska law which prohibited the teaching of any subject in any language other than English. This Court struck down the stat-

ute, stating that it deprived teachers and parents of their "liberty" without due process of law, in violation of the Fourteenth Amendment. In the Court's view, preservation of "liberty" includes the right of a teacher to teach useful subjects and "the right of parents to engage him so to instruct their children . . . ." *Id.* at 400.

Two years later, the Court considered an Oregon law which required all students to attend public schools. In *Pierce v. Society of the Sisters of the Holy Names*, the Court held that such a law deprives parents of their rights in the manner of selection of schools for their children:

> "[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. 510, 534-35 (1925).

In 1972, the rights of parents with respect to the education of their children under the Fourteenth Amendment were upheld again by the Court, citing *Meyer* and *Pierce*, in *Wisconsin v. Yoder*, 406 U.S. at 213-14.

B. Zoning Regulations Which Interfere With Parental Rights Must Be Closely Scrutinized

While local governments have broad powers to enact zoning ordinances, that power is not unlimited. As this Court stated in *Schad v. Borough of Mount Ephraim*,

> "the zoning power is not indefinite and unchallengeable; it 'must be exercised within constitutional limits.'" 452 U.S. 61, 68 (1981), citing *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

The *Schad* case involved a challenge to a local zoning ordinance which prohibited live entertainment within city limits. Recognizing that it "prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments" (*id.* at 65), the Court held that the ordinance must be carefully reviewed: "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. [Footnote omitted]." *Id.* at 68.

Even where a zoning ordinance restricts protected freedoms "only incidentally or only in a small number of cases," this Court has continued to scrutinize the justification for the regulation and has required the regulation to be "narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Schad*, 452 U.S. at 68 n.7. *See also Grosz v. City of Miami Beach*, 721 F.2d at 739 ("some degree of burden" on a religious practice necessitated a careful analysis of the zoning ordinance which imposed the burden).

On the other hand, simply because the protected activity can be conducted elsewhere does not mean that only an incidental burden is placed on the activity when it is in fact prohibited in some areas. In *Schneider v. State of New Jersey*, a municipal ordinance which prohibited the distribution of printed matter on streets and sidewalks or in parks was struck down as violative of the First Amendment. The Court rejected the argument that the burden on freedom of expression was only incidental because there were other public places where the material could be distributed. "[O]ne is not to have the exercise of his liberty of expression in appropriate places

abridged on the plea that it may be exercised in some other place." 308 U.S. 147, 163 (1939).

As discussed above, parental rights in the education of their children is a protected liberty interest which may be infringed upon, even incidentally, only by a substantial governmental interest. Thus, in the instant case, the City of Alexandria is not entitled to have its ordinance upheld simply because it is a zoning ordinance or simply because there may be other private schools to which parents could send their children. To the contrary, as is shown below, the ordinance significantly interferes with parents' rights to select a private, church-operated school for their children and therefore must be subjected to careful scrutiny to insure that fundamental liberties are not unduly abridged.

C. The Zoning Ordinance Which Imposes Conditions on the Operation of First Assembly's School Adversely Affects Parents' Rights To Direct the Education of Their Children

The conditions placed on the operation of First Assembly's school, among other things, prevent the school from teaching more than 75 students and from teaching 10th through 12th grades. Petitioners' App. 28a. Moreover, the Church must exclude "play facilities that are noise generators, including football and basketball," and must construct a fence around the perimeter of its entire 5.2 acre lot. *Id.* at 29a. Despite all these conditions, the school may operate for only a one-year trial period in order that the impact on the community may be assessed. *Id.* at 28a.

In sum, these conditions limit the number and ages of the children who may enroll in the school, restrict the activities of those who do attend, and make the Church school expensive to operate. By imposing these conditions, the City of Alexandria has effectively prevented many parents from sending their children to First As-

sembly's school, either because of the limit on size, grade level, and activities; because of the uncertainty of its continued existence; or because of the expense. Such an interference with parents' rights must, as this Court has said, be "narrowly drawn" and "further a sufficiently substantial government interest." *Schad*, 452 U.S. at 68.

The Fourth Circuit, however, looked only to whether the conditions furthered legitimate zoning purposes. It did not consider whether the conditions could be made less restrictive or, more importantly, whether the city's interest in imposing the conditions outweighed the fundamental right of parents to select an appropriate education for their children. The appellate court's decision which fails to even acknowledge important Fourteenth Amendment parental rights was erroneous and should be reversed.

III. THE COURT OF APPEALS' SUMMARY REJECTION OF FIRST ASSEMBLY'S CONSTITUTIONAL CLAIMS WARRANTS THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

On its face, the Fourth Circuit's decision in this case demonstrates a lack of concern for constitutional rights and for the judicial process. Such disdain should not be countenanced, and warrants the exercise of this Court's supervisory power over the lower courts.

In its complaint and in its briefs on appeal, the First Assembly of God Church raised serious questions involving freedom of religion, excessive government entanglement with religion, freedom of speech, freedom of association, freedom to choose the education of one's children, and equal protection of the law. The Court of Appeals failed to address many of these issues and only briefly discussed the others. Even the discussion which was provided ignored or misstated the factual allegations and legal arguments advanced by the Church.

For example, First Assembly argued that enforcement of some of the conditions would require frequent inspections of the Church, its school, and the activities of its students. The Church cited an instance where, after the SUP had been granted, a zoning inspector entered the sanctuary of the Church and observed a worship service in order to determine whether the high school students attending the chapel service were violating the conditions of the SUP. *See* Brief of Appellant, dated February 21, 1984, at 9-10. The Church sought to demonstrate that those types of inspections (as opposed to necessary fire, health, and safety inspections) created excessive entanglement with its religious beliefs and conduct. Without reference to the facts as alleged by the Church, the Court of Appeals held that there was no claim under the Establishment Clause of the First Amendment because the conditions imposed had a "strictly secular purpose." Petitioners' App. 4a.

Further, First Assembly argued that the conditions imposed by the city council were arbitrary and capricious and in violation of its rights to the equal protection of the law. Specifically, the Church demonstrated that no other school in the city, public or private, was required to erect a fence as extensive or expensive as that required of First Assembly or was limited as to the types of permissible playground activities. In addition, another private school located on a similar parcel of property, but with a smaller educational facility, was permitted to enroll substantially greater numbers of students than was First Assembly. *See* Brief of Appellant at 35-38. Ignoring the city's inconsistent application of its SUP requirement and looking only to "the face of each of the conditions," the Court of Appeals found that the conditions imposed were "substantially related to the preservation of important municipal objectives . . . ." Petitioners' App. 5a.

Not only did the Court of Appeals fail to consider the constitutional claims raised, but it allowed to stand a

District Court opinion and order which says, in essence, nothing more than "there is no violation of plaintiffs' constitutional rights." Petitioners' App. 8a. Such a holding is all the more egregious because it was made, not after a full trial on the merits, but on a motion for summary judgment. For the purposes of such a motion, all factual inferences are to be resolved in favor of the non-moving party. The District Court, and later the Court of Appeals, however, rejected the Church's uncontradicted factual assertions concerning their fundamental beliefs and the burden imposed on those beliefs by the SUP conditions.[10]

The failure of the Court of Appeals to correct the errors of the District Court and to properly consider First Assembly's constitutional claims is an extreme departure from "the accepted and usual course of judicial proceedings." Supreme Court Rule No. 17.1(a). For this reason, this petition for a writ of certiorari should be granted.

CONCLUSION

In its decision, the Court of Appeals has elevated a local zoning ordinance to a position of unprecedented importance. Under the Fourth Circuit's holding, a city may, simply by enacting a zoning ordinance, place heavy burdens on the free exercise of religion and on the rights of parents to direct the education of their children. The city need not show a substantial government interest in enacting the ordinance and need not show that the or-

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[10] Moreover, the Court of Appeals failed to exercise its independent judgment in reviewing the lower court's decision—judgment which this Court has recently indicated must be exercised in cases involving First Amendment issues. *See Bose Corporation v. Consumers Union of United States, Inc.*, —— U.S. ——, 104 S. Ct. 1949 (1984) (appellate judges reviewing freedom of the press questions must exercise independent judgment and determine whether the record supports the trial court's findings on those questions with convincing clarity).

dinance is the least restrictive means to a legitimate governmental goal.

This elevation of zoning ordinances, even above fundamental constitutional rights, is contrary to Supreme Court rulings and to rulings in other circuits. For these reasons, and for those stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1984

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1625

FIRST ASSEMBLY OF GOD, ALEXANDRIA, VIRGINIA; GILBERT and CHERYL COLON, in their personal capacity and on behalf of their child, GILBERT COLON, JR.; DONALD and DOROTHY BASS, in their personal capacity and on behalf of their children, SCOTT and PHILIP BASS; MEDA NALLEY in her personal capacity and on behalf of her child, NATALIE NALLEY; HARRY and MARY LOU WOLFKILL, in their personal capacity and on behalf of their child, PATRICK WOLFKILL; DAVID and SHIRLEY ROSE, in their personal capacity and on behalf of their child, BONNIE ROSE; RAMON and MARY BOTELLO, in their personal capacity and on behalf of their child, DAVID BOTELLO; PETER and MARY MYERS, in their personal capacity and on behalf of their child, GRETCHEN MYERS; LLOYD and MARILYN SIGAFOO, in their personal capacity and on behalf of their child, JULIE SIGAFOO; FRED and SANDRA LAIRD, in their personal capacity and on behalf of their child, SCOTT LAIRD; THOMAS and EDWINA GULBRONSON, in their personal capacity and on behalf of their child, PAUL GULBRONSON; and JOYCE DAILEY, in her personal capacity and on behalf of her child, EILEEN DAILEY,

Appellant,

VS.

THE CITY OF ALEXANDRIA, VIRGINIA and all of its agencies; CHARLES E. BEATLEY, JR., Mayor of Alexandria, Virginia; JAMES P. MORAN, JR., Vice Mayor of Alex-

andria, Virginia; DONALD C. CASEY, Member of City Council, Alexandria, Virginia; LIONEL R. HOPE, Member of City Council, Alexandria, Virginia, MARGARET B. INMAN, Member of City Council, Alexandria, Va.; CARLYLE C. RING, JR., Member of City Council, Alexandria, Virginia; and PATRICIA S. TICER, Member of City Council, Alexandria, Virginia;

Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
James C. Cacheris, District Judge. (C/A 82-1094)

Argued: May 8, 1984 Decided: June 22, 1984

Before WIDENER, HALL and MURNAGHAN, Circuit Judges.

Richard G. Gay (Joseph E. Dunne, III, May, Dunne & Gay on brief) for Appellant; Abbe David Lowell (Brand, Lowell & Dole; Cyril D. Calley, City Attorney of the City of Alexandria on brief) for Appellees.

PER CURIAM:

The First Assembly of God Church, students, and parents of students of the Church's Christian Academy, in Alexandria, Virginia, (collectively, the "Church"), appeal from the order of the district court granting summary judgment to the City of Alexandria and members of the City Council (collectively, the "City"), in

this action challenging the constitutionality of the City's zoning regulations. We affirm.

I.

In April, 1982, the Church applied for a special use permit to operate a private day school in the City. The City agreed to approve the special use pursuant to certain conditions. These conditions included restricting school enrollment to pre-school through ninth grade and erecting a fence and shrubbery barrier between the school and the surrounding neighborhood. The Church agreed to these conditions and, upon being granted a permit, opened its school in September, 1982. Upon opening the school, however, the Church failed to erect the fence and shrubbery barrier and admitted high-school students into the school's classes. Upon learning that the Church did not intend to abide by all of the conditions under which it was issued the special use permit, the City Council revoked the Church's permit.

The Church brought this suit in district court, alleging that the requirements imposed by the City violated the First and Fourteenth Amendments to the federal constitution. The City filed a counterclaim for injunctive relief. The district court found that (1) this was a zoning case, (2) "the zoning laws and ordinance of the City . . . which govern [the issuance] of special use permits [were] not unconstitutional," and (3) the plaintiffs' constitutional rights had not been violated. Accordingly, the district court granted defendants' motion for summary judgment and enjoined plaintiffs from operating a school at its present location without obtaining a special use permit.

Plaintiffs appeal.

II.

Appellants contend on appeal that the district court erred by finding that the zoning restrictions imposed

by the City did not violate the Establishment Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. Appellants also contend that the district court violated Fed. R. Civ. P. 65(d)[1] by issuing an order which granted appellees permanent injunctive relief without making any specific findings of fact. We disagree with each of these contentions.

In articulating the purpose of the Establishment Clause of the First Amendment, the Supreme Court has stated:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

Abington School District v. Schempp, 374 U.S. 203, 294-95 (1963).

In the instant case, the challenged special use permit conditions have a strictly secular purpose: the promotion of public health, safety, and welfare. The City's authority to require that such conditions be met was specifically recognized in *Lemon v. Kurtzman*, 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971), where the Supreme Court emphasized that "Fire inspections [and] building and *zoning regulations* . . . are examples of necessary and permissible contacts." *Id.* at 614 (emphasis added). In

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[1] Fed. R. Civ. P. 65(d) provides that "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . ."

light of this clear precedent, there is no merit to appellants' First Amendment complaint.[2]

Nor do zoning ordinances violate the Fourteenth Amendment's due process clause unless they are found to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). It is plain from the face of each of the conditions set forth by the City Council that the conditions are substantially related to the preservation of important municipal objectives, such as traffic and road safety, fire prevention, and noise. Accordingly, appellants' complaint under the Fourteenth Amendment must also fail.

III.

Appellants contend that the district court violated Fed. R. Civ. P. 65(d) by issuing an order which granted appellees permanent injunctive relief without making any specific findings of fact. There is no merit to this contention.

The purpose of Fed. R. Civ. P. 65(d) is to protect a party subject to an injunction so that he may know precisely what he must refrain from doing in order to comply with the injunction. *See Gunn v. University Community to End the War*, 399 U.S. 383, 388-90 (1970). The district court's order complied with this purpose. The paragraph granting the injunction specifies

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[2] Appellants also argue that the City violated their First Amendment rights by placing a direct burden on their right to disseminate religious beliefs. We find this argument untenable. Burdens on religous freedoms have been categorized as either restricting beliefs or regulating conduct. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Here, the City has neither attacked appellants' religious beliefs nor sought to regulate their conduct and, therefore, cannot be said to have burdened appellants' religious freedom.

what the act enjoined, the parties covered, the place, and the duration of the injunction. Accordingly, appellants' contention must fail.

IV.

For the foregoing reasons, the order of the district court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

C.A. No. 82-1094-A

FIRST ASSEMBLY OF GOD, ALEXANDRIA, VA.,
Plaintiff,

vs.

THE CITY OF ALEXANDRIA, VA.,
AND ALL OF ITS AGENCIES,
Defendants.

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10:12 o'clock, A.M., on May 31, 1983.

Before: HONORABLE JAMES C. CACHERIS, Presiding United States District Judge

APPEARANCES:

For the Plaintiff:

RICHARD G. GAY, ESQ.

For the Defendants:

CYRIL D. CALLEY,
Alexandria City Attorney
ABBE LOWELL, ESQ.
THOMAS MARTIN, ESQ.

[2] PROCEEDINGS

THE COURT: Let me just go to the First Assembly of God case versus the City of Alexandria. I had indicated previously that the court was going to grant the defendant's motion for summary judgment. I'd had my clerks call counsel and then followed with a letter because I didn't want the parties to undertake any further preparation or expense because I decided to grant the motion for summary judgment.

After reviewing all the pleadings, evidence, authorities and arguments of counsel, the court has decided to grant the defendant's motion for summary judgment and dismiss the plaintiff's complaint and grant the defendant's counterclaim.

Basically, the facts are undisputed. The evidence shows in the case that the plaintiffs applied for a special use permit to operate a private day school in April and May of 1982.

The city council voted to approve that special use permit with 12 conditions. The conditions were to minimize the school's impact on the surrounding environment and neighborhood.

The school opened in September, 1982. Subsequently thereafter, this suit was filed which raises various issues regarding alleged violations of constitutional law. The plaintiffs violated the certain conditions of the special use permit. Some of them were: they built a fence, refused [3] to build a proper fence, and shrubs, and they were told not to operate a high school, which they did.

The city council voted on January 25, 1983, to revoke the permit for violation of the special use permit. Defendants counterclaimed for operating the school without a permit, and I find that the zoning laws and ordinance of the City of Alexandria and the Commonwealth of Virginia which govern this case for the issues of special use permits are not unconstitutionally vague, there is no violation of plaintiff's constitutional rights; that the

legislative distinction between private and public schools are the zoning laws and ordinance of the Commonwealth of Virginia and the City of Alexandria that do not deny plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment.

The zoning laws of the Commonwealth of Virginia and the special use permit do not violate the plaintiff's religious rights under the Free Exercise Clause of the First Amendment to the Constitution or of the Virginia Constitution; that the imposition and enforcement of the special use permit condition does not entangle the government and the City of Alexandria and the church ministry in violation of the Establishment Clause of the First Amendment or to the Virginia Constitution.

The special use permits that are a requirement of the City of Alexandria and the use permit requirements do not [4] deprive the plaintiff of the right of privacy, education or association of the due process clause of the Fourteenth and Ninth Amendment to the Constitution.

The special use permits requirements by the City of Alexandria and the State of Virginia do not affect an unlawful taking of property without just compensation; that the enforcement of the special use permit does not violate search and seizure provisions of the Fourth Amendment of the Virginia Constitution or the U.S. Constitution.

The Court concludes that the facts are not in dispute, this is a zoning case, that the defendants are in violation of the zoning laws of the City of Alexandria, the State of Virginia, and I conclude that the Motion for Summary Judgment should be granted, that the judgment should be entered for the defendants on the summary judgment, that the complaint should be dismissed, and the judgment entered on the counterclaim for the defendants, that the plaintiffs are enjoined permanently from operating the school, a private school, at 700 West Braddock Road, Alexandria, Virginia, without a special use permit.

Again, I think this is a zoning case and that the plaintiffs are in violation, that there is no constitutional violation of either Virginia or the U.S. Constitution. So, on that basis, the Court will go ahead and enter an appropriate order. I'll go ahead and adjourn court.

[5] MR. GAY: Your Honor.

THE COURT: Yes, sir.

MR. GAY: One question. The school has about, I think, 10 or 15 days to complete its yearly schedule, and I would just ask that the court defer the enforcement.

THE COURT: Do you want a stay? Give me a day certain.

MR. GAY: June 17th.

THE COURT: Any objections?

MR. CALLEY: No, your honor.

THE COURT: Okay. I'll stay enforcement until June 17.

MR. GAY: Thank you, your honor.

THE COURT: Thank you.

I'll go ahead and adjourn.

(At 10:12 o'clock, A.M., the hearing in the above-entitled matter was concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 82-1094-A

FIRST ASSEMBLY OF GOD,
ALEXANDRIA, VIRGINIA, *et al.*,
Plaintiffs

v.

THE CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Defendants

ORDER

Upon consideration of the pleadings, evidence, authorities, and arguments of counsel, and for reasons stated in open court, it is accordingly

ORDERED:

(1) that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED;

(2) that judgment be entered in favor of the defendants on plaintiffs' complaint;

(3) that judgment be entered in favor of the defendants on the counterclaim;

(4) that plaintiffs be, and they hereby are, permanently enjoined from operating any type of private school at 700 W. Braddock Road, Alexandria, Virginia, without obtaining a special use permit. This injunction is stayed until June 17, 1983.

The Clerk of the Court shall forward certified copies of this Order to all counsel of record.

/s/ James C. Cacheris
United States District Judge

May 31, 1983
Alexandria, Virginia

ALEXANDRIA CITY CODE, excerpts

Sec. 7-6-12 R-20 residence zone.

(a) *Uses permitted.* The following uses only shall be permitted in the R-20 residence zone:

* * * *

(9) a. School, public.

b. School, private (permitted only with special use permit as specified in sections 7-6-191 to 7-6-195 of this code).

* * * *

Sec. 7-6-13 R-12 residence zone.

(a) *Uses permitted.* The following uses only shall be permitted in the R-12 residence zone:

(1) Any use permitted in the R-20 residence zone.

* * * *

Sec. 7-6-14 R-8 residence zone.

(a) *Uses permitted.* The following uses only shall be permitted in the R-8 residence zone:

(1) Any use permitted in the R-12 residence zone.

* * * *

Special Use Permits

Sec. 7-6-191 Intent of article.

It is the intent of this article to provide for review by the council of the use of land for certain purposes which normally would be allowed in the zones as set forth in sections 7-6-11 to 7-6-33 of this code, but which, due to peculiar conditions connected with such uses, may warrant further investigation and review. (Code 1963, Sec. 42-68)

Sec. 7-6-192 Procedure as to issuance.

Special use permits may be granted by the city council for any of the uses for which a special use permit is required by the provisions of this chapter; provided, that before any such special use permit is granted, the following provisions shall have been complied with:

* * * *

(5) If the city council shall find that, after a duly advertised public hearing into the circumstances of the particular situation, the use for which the use permit is sought will not affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use, will not be detrimental to the public welfare or injurious to property or improvements in the neighborhood and will be in accord with the purposes of the master plans of the city, it may issue the use permit, provided all regulations and provisions of law shall have been complied with. In granting any use permit, the city council shall designate such conditions in connection therewith as will, in its opinion, assure that the use will conform to the foregoing requirements and will continue to do so, and the city council may designate whether such is granted to a specific person or is granted to the owner or occupant and their successors in title.

* * * *

FIRST ASSEMBLY OF GOD
700 West Braddock Road
Alexandria, VA 22302
(703) 548-0339

Thomas F. Gulbronson, D. Min.
Pastor

Rev. Timothy P. Cerce
Minister of Youth & Visitation

Rev. David McCulley
Minister of World Missions & Senior Citizens

Fred Laird
Director of Music

Carlton S. Burnell, Jr.
Business Manager

Geri M. Harper
Administrative Assistant

April 30, 1982

Gentlemen:

We are herewith submitting our applications for a special use permit to extend our weekend teaching ministries to a Monday through Friday teaching ministry for the children in ages 2 years through twelfth grade.

It is my understanding that the forms attached will provide all information that is required by you. If there is further information that you require please feel free to contact me through the church office and I will gladly submit the same.

Sincerely,

/s/ Barbara R. Hageman
BARBARA R. HAGEMAN

BRS/brh

SPECIAL USE PERMIT 1481

INFORMATION AS REQUIRED UNDER ORDINANCE NO. 2495

All applications for special use permits must include the following information, supplied in writing by the applicant for such special use permit:

(1) A map showing the location of all properties (in whole or in part) within three hundred (300) feet of the boundaries of the property for which a special use permit is sought which:

a. contain uses substantially similar to those for which an application for a special use permit is made, or

b. contain residential uses.

(2) Plans of the applicant to control any potential impacts of the proposed use on the nearby community, including:

a. Noise. The noise levels anticipated from all mechanical equipment and a statement as to whether such anticipated noise complies with the levels permitted by chapter 22A of the city code. Plans of the applicant to control these noise levels, as well as those emanating from patrons.

There will be no equipment noises as a result of the use of property in this manner. As an extension of our weekend teaching ministry there will be only a minor amount of playground activities. Due to a maximum number of children set at 25 for playground at one time noise will be well below any experienced during present weekend activities.

b. Odors. The methods to be used to control odors emanating from the use.

Not applicable for use requested.

c. Trash and litter. The type and volume of trash and garbage the proposed use will generate. The planned frequency of trash and garbage collection. The planned methods to prevent littering on the property, the streets and nearby properties.

A full time maintenance crew is now employed and will continue to be employed. This will certainly take care of any additional trash which we would estimate to be an extra ½ bag per day.

d. Loading/unloading. The availability and adequacy of off-street loading facilities to serve the proposed use. The hours and frequency of off-street loading, if used or needed.

As on our weekend ministries all pickup and delivery will be in the rear of the facility. In order to smooth arrival and departure of family cars we will be making one driveway entrance only and one exit only. This should take care of any problems on Braddock Road. Hours of arrival will be spread across 7:00 a.m. and 8:30 a.m. There would probably be no more than eight cars arriving at the exact same time, far less than for our weekend ministries. Hours of departure will extend from 3:00 until 6:00.

e. Parking. The location of parking either on-site or within three hundred (300) feet of the site, and the number of spaces available to serve the employees and patrons during hours of operation.

The existing parking lot meets the requirement of being within 300 feet of the site and holds approximately 202 cars. Use of the facility Monday through Friday for our teaching ministry will add approximately 6 to 8 employees to the current staff. This should not present a problem.

f. Streets. The design capacity of all streets upon which the use shall have frontage.

The only road that we will have frontage on remains Braddock Road, two lane at the area of the church, but designated as a snow emergency route by the city and well able to handle the traffic, which again will remain far below the traffic requirements of our existing weekend ministry.

g. Use capacity. The estimated number of patrons, clients, pupils and other such users. The proposed number of employees, staff and other personnel.

We would propose at this time to limit ourselves to a total of 350 students, well below capacity for the entire structure. At this maximum it would require approximately 18 staff members. Of course ratios among the younger children would be lower than for the older. It is conceivable depending upon the ages of those 350 children to require 20-25 staff.

h. Hours. The proposed hours and days of operation of the use.

We propose to open the facility at 7:00 a.m. and close at 6:00 p.m.

i. Loitering. The methods to control any loitering outside or near the proposed use.

No loitering will be allowed:

(3) Each application shall contain a clear and concise statement identifying the applicant, including the name and address of each person owning an interest in the applicant and the extent of such ownership interest. If the applicant itself, or one of such persons holding an ownership interest in the applicant

is a corporation, each person owning an interest in excess of ten percent (10%) in the corporation and the extent of the interest shall be identified by name and address. For the purpose of this section, the term "ownership interest" shall include any legal or equitable interest held in the subject real estate at the time of the application.

Docket Item # 7

S.U.P. # 1481

Planning Commission Meeting
Tuesday, July 6, 1982
7:30 P.M., Council Chambers

ISSUE: Consideration of a request to operate a private school.

APPLICANT: First Assembly of God Church.

LOCATION: 700 West Braddock Road.

ZONE: R-8, Residential.

RECOMMENDATION:

Recommend approval subject to all applicable codes and ordinances and the following conditions:

1. That the total enrollment be limited to a maximum of 350 students as requested by the applicant. (P & CD)
2. That a maximum of 25 children be allowed outside at any one time for playground activities as stated by the applicant. (P & CD)
3. That the applicant obtain a license from the Virginia Department of Welfare and Institutions for the care of those pre-school students under the state's jurisdiction prior to operation of the school. (P & CD)
4. That this permit be granted for a one (1) year trial period from commencement of the school operation and that the permit be reviewed at the end of that time by the Planning Commission and City Council. (P & CD)
5. That the driveway accesses to the school be one-way in at the west driveway, and one-way exit

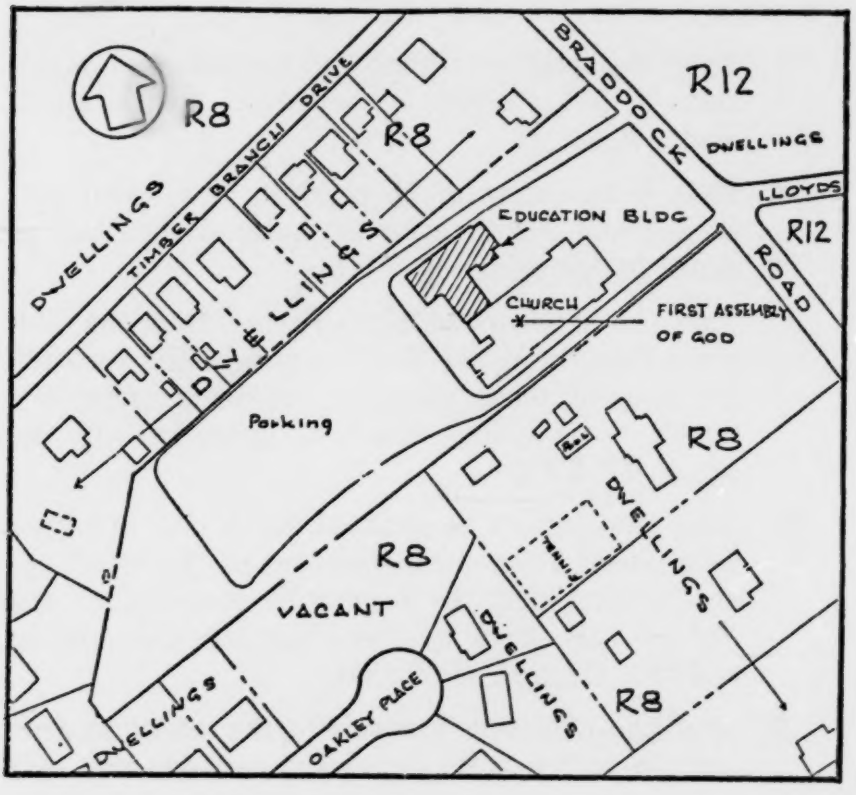
at the east driveway. City to maintain signing within the public right-of-way and the school to place and maintain the signing on the private property. (T & ES)

6. Positively no pick-up or delivery of persons or materials will be made from West Braddock Road. (T & ES)

7. All persons and materials will be delivered to the school or church from the interior of the property, off of the public right-of-way. (T & ES)

8. Applicant to grant and dedicate emergency vehicle easements over existing driveways (Fire)

The property in question and surrounding land use are shown on the sketch below:



DISCUSSION:

The subject property is one (1) parcel of record having approximately 237 feet of frontage on West Braddock Road, a depth of approximately 690 feet and 925 feet on the west and east sides respectively and a total lot area of 4.2 acres.

The area surrounding the property in question is zoned R-8 and R-12, residential and developed by single family dwellings.

The applicant proposes to operate a "Christian academy with extended care" which constitutes a private school from a zoning code standpoint. Private schools are allowed in all zones of the City with a special use permit.

The applicant proposes to operate a private school for a maximum of 350 students ages two (2) years through twelfth grade. The mix of these age groups is not known at this time by the applicant.

The applicant has stated that depending on the age mix of the school children that a maximum of 20-25 staff would be involved in the private school operation.

The private school will be conducted in the education building on the church property. This educational building was approved by the Planning Commission as site plan #73-019 on June 5, 1973. The main church building was approved by the Planning Commission as site plan # 63-036 on March 7, 1963.

Access to the educational building is from West Braddock Road with two (2) driveways serving the property. The applicant has agreed to make the east driveway an "exit only" and to make the west driveway an "entrance only".

The applicant has stated that hours of arrival of the children will be generally from 7:00 A.M. to 8:30 A.M. The hours of departure will be generally from 3:00 P.M. to 6:00 P.M. The children will be dropped off behind the

educational building in the parking area which is a paved area with 202 parking spaces.

The proposed private school will be open from 7:00 A.M. to 6:00 P.M., Monday through Friday.

A license from the Virginia Department of Welfare and Institutions will be required.

Section 7-6-12(a) (9) (b) of the City Code allows private schools in the R-8, residential zone with a special use permit.

The applicant is advised that in accordance with Section 42-70 of the City Zoning Code, construction or operation of approved Special Use Permit shall be commenced within one year of date of issuance or the Special Use Permit shall become void.

LAND USE AND MAJOR THOROUGHFARE PLAN:

Residential land use is shown for the subject property on the Land Use Plan Map of the Consolidated Master Plan.

West Braddock Road is shown as a primary collector street on the Major Thoroughfare Plan Map.

ZONING HISTORY:

The current Fifth Revised Zoning Map of 1963 shows the subject property as R-8, residential, which has remained since adoption of the Third Revised Zoning Map of 1951.

DEPARTMENTAL COMMENTS:

Transportation & Environmental Services:

No comment.

Fire:

R-1 Applicant to grant and dedicate Emergency Vehicle Easements over existing driveway.

Building & Mechanical Inspections:

No objections.

Electrical:

Any new wiring needed for the use stated above must comply with the 1978 National Electric Code and Chapter 6A of the City Code.

Plumbing:

Approved.

Health:

This department has no objection to the use as proposed. However, the facility must comply with city and state laws regarding food service, health and safety, water supply and sewage disposal.

Accordingly, plans must be submitted to and approved by this department prior to any construction, renovation or modification of the facilities. An Alexandria Health Department permit will be required prior to operation of the food service facility; permit will be issued after inspection to assure that facility is in compliance. A certified food service manager must be on duty during operation.

Police:

Recommend security survey of the business, at the applicant's convenience, by contacting the Crime Resistance Office at 838-4520.

Virginia Department of Welfare & Institutions:

A state license is required.

STAFF ANALYSIS:

The area surrounding the proposed private school is developed by single-family detached residences. With the addition of a 350 student private school to the area, there

is no doubt that vehicular traffic will increase in these residential areas. The City Transportation Staff feels, however, that this increased volume of traffic generated by the proposed school can be adequately absorbed by the area.

Staff is of the opinion that a one (1) year trial period should be imposed on this permit in order to evaluate the school operation and its impact on the neighborhood during the year.

DATE: MAY 25, 1982

TO: CHAIRMAN & MEMBERS ALEXANDRIA PLANNING COMMISSION

THRU: DAYTON L. COOK, DIRECTOR, T & E S

FROM: CHARLES E. KENYON, CHIEF
TRANSPORTATION DIVISION, T & E S

SUBJ: SPECIAL USE PERMIT # 1481 PRIVATE SCHOOL —FIRST ASSEMBLY OF GOD (700 W. BRADDOCK ROAD).

Recommend that the following conditions be placed on the special use permit, if approved:

1. That the driveway accesses to the school be one-way in at the west driveway, and one-way exit at the east driveway. City to maintain signing within the public right-of-way and the school to place and maintain the signing on the private property.
2. Positively no pick-up or delivery of persons or materials will be made from W. Braddock Road.
3. All persons and materials will be delivered to the school or church from the interior of the property, off of the public right-of-way.

The peak AM rush hour on W. Braddock Road at this location is 8 AM to 9 AM. The peak PM period is 5 PM to 6 PM. Using the highest trip generation rates available from the Institute of Traffic Engineers, I find the following trips generates:

School Peak Hours	School Trips	Traffic Volume on West Braddock Road.
7 AM-9 AM	154	1,250
3 PM-4 PM	144	599

The morning impact on W. Braddock Road should be minimal as the school will generate only 154 trips which

is only 12.4% of the peak period volume and the right turns in will cause minimal delay.

The afternoon peak periods do not conflict. The additional traffic volume generated by the school will be felt, however, W. Braddock Road has a capacity in excess of 4,000 vehicles per hour.

The PM period would be critical, if the peak demand periods conflicted as the problem exists for westbound Braddock Road at King Street.

CEK:fas
Attachment

PLANNING COMMISSION MEETING OF JULY 6, 1982:

Rev. Thomas Gulbronson and Ms. Barbara Hageman represented the application.

Mr. Vince Lopenza, member of church for 10 years, spoke in favor.

1. H. Carter Land, Attorney, representing a coalition of neighbors in the area introduced the following persons in opposition of the request:
2. Mr. Newsome, President of Northridge Civic Association.
3. Ms. Anne Saloom, resident of Timber Branch Drive.
4. Ms. Knezo, 606 Oakley Place.
5. Col. Pickard, resident, 729 West Braddock Road.
6. Mr. Willis Wills, resident of Malcolm Place.
7. Mr. Theodore Deems, resident Timber Branch Parkway.
8. Mr. Albert Chaiken, former resident of Oakley Place.

COMMISSION ACTION:

On a motion of Mr. Kamerow, seconded by Mr. Cockrell, the Planning Commission voted to recommend denial of the request.

The motion carried on a vote of 7 to 0.

REASON:

The Commission felt that this was not an ordinary day school or nursery but a full private school. Commission stated concern for lack of space as well as noise and traffic.

CITY COUNCIL MEETING OF SEPTEMBER 18, 1982:

Granted, subject to compliance with applicable codes, ordinances and recommendations and conditions as following:

amending condition # 1 to read: Total enrollment be limited to a maximum of 75 students (grade pre-school to 9th grade);

2. That a maximum of 25 children be allowed outside at any one time for playground activities;

3. That the applicant obtain a license from the Virginia Department of Welfare and Institutions for the care of those pre-school students under the State's jurisdiction prior to operation of school.

4. That the permit be granted for a one (1) year trial period from commencement of the school operation and that the permit be reviewed at the end of that time by the Planning Commission and City Council.

5. That the driveway accesses to the school be one-way in at the west driveway, and one-way exit at the east driveway. City to maintain signing within the public right-of-way and the school to place and maintain the signing on the private property.

6. Positively no pick-up or delivery of persons or materials will be made from West Braddock Road.

7. All persons and materials will be delivered to the school or church from the interior of the property, off of the public right-of-way.

8. Applicant to grant and dedicate emergency vehicle easements over existing driveways.

9. That the fence be installed, subject to approval of the Departments of Transportation and Environmental Services and the Planning Department; it to be an 8 foot high chain link fence with redwood slats with evergreen trees, planted at intervals not to exceed 10 feet (to be white pine or similar trees); to be installed within 90 days from the date of approval of the Special Use Permit

10. Additional requirement that a Certificate of Occupancy be obtained before school opens, and this to include the fire alarm system.

11. To exclude play facilities that are noise generators, including football and basketball, limiting to those that generate little or no noise.

12. That the school will make maximum use of carpooling to transport students.

Motion made by Councilwoman Inman and seconded by Councilwoman Ticer and carried on a vote of 7-to-0

Office-Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,

Petitioners,

v.

CITY OF ALEXANDRIA, VIRGINIA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondents

Of Counsel:
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City Attorney of Alexandria
City Hall
Alexandria, Virginia 22314

BEST AVAILABLE COPY

COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondents do not accept the Questions Presented by the petitioners. Rather, the respondents suggest that the only questions are:

1. Whether petitioners' religious belief concerning the need to provide for their childrens' education mandates an exemption from a valid, neutral, and generally applied zoning ordinance that limited the size of the student population in and required the erection of privacy and noise-abatement fencing around a week-day school in a residential area.

2. Whether petitioners are estopped from challenging zoning regulations under which they have accepted benefits for twenty years, particularly when they proposed some of the very regulations, in the way of permit conditions, which they now challenge.

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IN THE

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OCTOBER TERM, 1984

No. 84-445

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case involves a church's challenge to the City of Alexandria's zoning scheme *after* the church had applied for and received a zoning permit to operate a weekday school on its present grounds in a residential neighborhood of single family homes. The Church was not excluded from the City or from any zone in the City. The Church objects to conditions, most of which it had recommended itself, which the City made part of the use permit granted. The conditions imposed were similar or identical to ones imposed on other church and secular private schools in the City.

After accepting the permit it had sought and opening the school, petitioners brought an action in the United States

District Court for the Eastern District of Virginia challenging the zoning scheme and the specific permit in a twenty-four page complaint.

The original complaint contained over a dozen separate charges of unconstitutionality, ranging from freedom of religion, to taking without compensation, even to search and seizure. The district court refused petitioners' motion for a preliminary injunction. Later, the court, as petitioners note, granted respondents summary judgment after a considerable amount of discovery had occurred. The discovery, only part of which is presented in the petition, revealed undisputed facts which do not support the various claims which petitioners have unsuccessfully asserted in two federal courts.

Among some of the most important facts which petitioners omitted were those which explained the place weekday education has in petitioners' religious practices. The General Council of the Assemblies of God, with which petitioner First Assembly is associated, has promulgated a "Statement of Fundamental Truths" describing its beliefs. There is no reference in this document or any of the Church's guiding documents to a weekday church school or the convictions of education claimed by the Church in the litigation (Jt. App. 466, 496). There is similarly no reference in the Church's writings or in petitioners' depositions to any religious belief regarding the size of school populations or noise abatement, privacy fences.

The decision whether to operate day schools is left for each congregation of the First Assembly of God, and not all congregations choose to do so. There is no unique significance to the present location of the Church, as it has been situated in three other places in the City (Jt. App. 501). The Church did not operate a day school in its previous locations from 1919, when it was founded, until 1982, when the Church's current pastor determined to operate a school. That decision, it should be noted, was subject to a vote by the congregation.

A member of the Church cannot be disciplined under First Assembly's Constitution and Bylaws for sending children to a public school or a school not affiliated with First Assembly (Jt. App. 409-11). Some parents, including the pastor, admitted to

sending their children to public schools for part of their children's education and to another First Assembly school located in an adjacent town. They switched to petitioners' school because it was safer or more convenient, not due to any religious reason. (Rec. Vol. III).

While petitioners acknowledge making three different applications for their permit, they fail to note that *they* included in these applications a number of limitations intended to minimize the impact of the school on the neighborhood: hours of operation would be limited; hours of outdoor play would be restricted; the number of children outside would be limited; the public road would not be used to drop off students or make deliveries; the Church would make its driveways one-way in and out; the school would maximize carpooling of students; and the school would use trees and bushes to buffer noise from neighbors' property (Jt. App. 508, 510, 522-24, 534).

During the City's consideration of the First Assembly's applications, the Church amended its requested permit by (1) reducing planned enrollment to ninty-eight students; (2) including construction on the border of the property of a combination shrubbery and privacy fence to reduce visual and noise impact from children playing on the grounds; and (3) including car-pooling by the parents (Jt. App. 544-47). Again, all these ideas originated with the Church. The City Council then rejected a recommendation by its own Planning Commission and expressions of strong opposition to the school by the community to approve the permit.

While the Church complains about City inspections of its school after the permit was granted, it does not state, as it should, that no visit occurred unless a specific complaint about a use violation was made and that, on some occasions, City officials came to the Church because they were invited by church officials to do so (Jt. App. 443-44). Indeed, the *only* occasion in which a city official ever went inside the building was when he was specifically asked by the Pastor to do so (Rose Dep. at 135-36).

Respondents argued and the district court found that no religious-based claims were involved in this case because the

City's action, imposing traditional conditions on a special use permit, did not interfere with any of petitioners' beliefs or religious conduct (Pet. App. at 9a). Stripped of these unsupported First Amendment claims, the Church was left to argue that these conditions were "arbitrary and capricious" and violated their right to due process. Given the minimal burden to justify such zoning regulation, this challenge also failed (Pet. App. 9a).

Petitioners then appealed to the United States Court of Appeals for the Fourth Circuit which, agreeing with the City's assertions and the district court's holding, concluded that " . . . the City has neither attacked appellants' religious beliefs nor sought to regulate their conduct and, therefore, cannot be said to have burdened appellants' religious freedom" (Pet. App. at 5a, n.2). Finding no legitimate freedom of religion claim, the court of appeals then upheld the zoning scheme and conditions holding that "[i]t is plain from the face of each of the conditions set forth . . . that [they] are substantially related to the preservation of important municipal objectives, such as traffic and road safety, fire prevention, and noise" (Pet. App. at 5a).

From this decision, completely in line with all precedents, petitioners now seek this Court's review.

REASONS FOR DENYING THE WRIT

The petition for certiorari seeks to create a constitutional confrontation between (i) the rights to freedom of religion and to direct the education of children and (ii) the police power of the state to enforce valid and neutral zoning ordinances enacted to control noise, traffic, and safety hazards. But this case is a most inappropriate one for resolving such a confrontation. Petitioners still have not shown that any of their religious beliefs or practices are in any way impacted by such noise, traffic control, and safety ordinances. Consequently, the balance of competing rights which petitioners assert simply does not exist in this case.

The petition thus reduces itself to the virtually frivolous contention (Pet. at 24) that the conditions imposed by the Alexandria City Council, used by the city for years and suggested in some instances by petitioners themselves, "were arbitrary and capricious and in violation of [the First Assemply's] rights to the equal protection of the law." Equally without merit is the subsidiary claim that the Fourth Circuit refused to consider important constitutional questions and allowed the district court to dispose of the multitude of claims in the complaint without findings of fact and "a thorough discussion of the legal principles applied" (Pet. at 23-25).

Although petitioners cast their plea for certiorari in terms which might be recognized under this Court's rules and precedents—a conflict between the circuits, a decision contrary to this Court's rulings, a case appropriate for this Court's supervisory power—these are little more than labels pinned on petitioners' claim that the courts below were wrong. *See Ross v. Moffitt,* 417 U.S. 600, 616-17 (1974) (Court review depends on factors "other than the perceived correctness of the judgment" below).

As an affirmation of the City's right to impose traditional zoning regulation on the use of land, the Fourth Circuit's decision is completely in line with this Court's and other Circuits' opinions, and there are no issues in this case justifying the grant of certiorari. The petition should, therefore, be denied.

I.

THE FOURTH CIRCUIT'S DECISION UPHOLDING THE CITY'S ZONING LAWS AGAINST FREE EXERCISE, ESTABLISHMENT, AND DUE PROCESS CHALLENGES ACCURATELY APPLIED THE PRECEDENTS OF THIS COURT AND DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS.

Petitioners concede in their very first discussion of applicable precedents that "their right to engage in religious practices or conduct in furtherance of that belief may be subject to

reasonable time, place and manner restrictions in order to 'safeguard the peace, good order and comfort of the community . . .' " (Pet. at 11-12, *quoting Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940)).

Petitioners then leap from this undisputed principle to the assertion that the foregoing always "involves a balancing of the burden on religious activities with the government's interest in enforcing the regulation" (Pet. at 12). However, every incantation of First Amendment rights does not propel a litigant ineluctably to a "balancing." First, and always, the party claiming burden must demonstrate an impact by the regulation at issue on a basic religious belief or a fundamental right. This, as recently noted, is not an easy task. *See United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring) (The Court has erected "a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . . ").

A. This Case Does Not Involve First Amendment Rights In Conflict With Government Authority.

The scrutiny and "balancing" petitioners seek in order to invalidate the City's zoning scheme occur only when the government's action "contravenes the basic religious tenets and practices of the [person's] faith" or "compels [a person] to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972). The burden of proving this is placed on the person challenging the government's action, *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963), and as much as they may try, petitioners simply cannot liken their claims to those which were addressed in the Court's principal free exercise cases. *See Wisconsin v. Yoder,* 406 U.S. at 218 (Amish requirement of living separate and apart from society was a "fundamental tenet"); *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (Seventh Day Adventist's refusal to work on Sabbath was a "cardinal principle"); *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 717

(1981) (Jehovah's Witness' refusal to build armaments based on a "central precept"). What tenets of petitioners' religious faith compel them to conduct schools free from neutral zoning regulations restricting school population at certain locations or requiring noise abatement and privacy fences? The testimony given by petitioners' themselves—other locations used by the Church in the City, no requirement of weekday schools in their religious tenets or written constitutions and by-laws, use of public schools in the past—convincingly shows that there simply is no claim on a par with *Yoder, Sherbert,* or *Thomas* in this case.

Also, any "burden" imposed by the City's zoning laws—costs of complying with enrollment limitation or erecting privacy fence and shrubs—cannot seriously be compared to those in the cases on which petitioners rely—*Yoder* (criminal prosecution), *Sherbert,* and *Thomas* (life threatening economic sanctions). Instead, the costs to petitioners, if any, of complying with the law are attenuated, incidental, and indirect. As such, they do not involve an impermissible burden. *See Braunfield v. Brown,* 366 U.S. 599, *reh. denied,* 368 U.S. 869 (1961).[1]

Contrary to petitioners assertion of a "conflict" (Pet. at 10), the Fourth Circuit's decision is completely in line with the two courts of appeals which have ruled in this area. In *Grosz v. City of Miami Beach,* 721 F.2d 729, 731 (11th Cir. 1983), the

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[1] While never having written an opinion in this precise area, this Court has indicated that zoning laws harsher than those in this case, including those which totally excluded a religious use, do not violate the First Amendment and do not require the kind of balancing asserted. *See Damascus Community Church v. Clackamas County,* 45 Or. 1065, 610 P.2d 273 (1980) (denial of permit to operate school on church grounds) *appeal dismissed for want of substantial federal question,* 450 U.S. 902 (1981); *Allendale Congregation of Jehovah's Witnesses v. Grosman,* 30 N.J. 273, 152 A.2d 569 (1959) (denial of permit to build church when site inappropriate), *appeal dismissed for want of substantial federal question,* 361 U.S. 536 (1960); *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5 (refusal to grant permit to build a church), *appeal dismissed for want of substantial federal question,* 359 U.S. 436 (1959); *Corporation of Presiding Bishop v. City of Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823 (churches excluded from all residential zones), *appeal dismissed for want of substantial federal question,* 338 U.S. 805 (1949); *cf. American Communications Ass'n v. Douds,* 339 U.S. 382, 397-98 (1958) (Court explains dismissals in cases cited above).

city's *total* exclusion of churches and synagogues from *all* single family residential zones was upheld by the court of appeals, against a claim made by a rabbi unable to commute easily, because the burden "in terms of convenience, dollars or aesthetics" did not rise to the level of those which had been struck down by this Court. 721 F.2d at 739. In *Lakewood, Ohio Congregation of Jehovah's Witnesses v. Lakewood, Ohio,* 699 F.2d 303 (6th Cir.), *cert. denied,* 104 S.Ct. 72 (1983), the court of appeals upheld the validity of a zoning law which precluded construction of churches in all but *ten percent* of the City because the City's zoning law "does not prohibit the Congregation or any other faith from worshipping in the City . . . . " 699 F.2d at 307. Land on which the church in *Lakewood* could build (or on which petitioners might not need all of the conditions in their permit) might be more expensive, "but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches." *Ibid.*[2]

Petitioners' attempt to create an excessive entanglement issue fairs no better. As the Fourth Circuit observed below, "the special use permit conditions have a strictly secular purpose: the promotion of public health, safety, and welfare" (Pet. App. at 4a). In so holding, the Fourth Circuit relied on and quoted from this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602, 614, *reh. denied,* 404 U.S. 876 (1971), which states: "Fire inspections, building and *zoning regulations,* . . . are examples of necessary and permissible contacts" (emphasis added). *See also Larkin v. Grendel's Den, Inc.,* 459 U.S. 116,

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[2] While *Grosz* speaks of "balancing" in the general sense, the *Grosz* court specifically endorsed the Sixth Circuit's rationale in *Lakewood.* 721 F.2d at 740. This loose reference by the *Grosz* court may be the reason for petitioners' misimpressions that the mere assertion of First Amendment rights requires "balancing." Even if petitioners can construe *Grosz* or *Lakewood* to require any balancing, the Fourth Circuit's failure to do so in this case is harmless. The regulation in dispute here—conditioning the use of the church's desired land—is far less severe than the total prohibition in *Grosz* and the near total prohibition in *Lakewood.* The reasons for regulation—protection of the public safety, health and welfare—are the same. Consequently, the result of the case would have been the same no matter which of the courts of appeals' formulations was used.

121 (1983) (" . . . and and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws").

Even assuming that petitioners were able to set up the confrontation they desire, no issue important enough for certiorari would be involved. Time and time again, this Court has reiterated that no person can be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs. Most recently, in *United States v. Lee,* 455 U.S. 252 (1982), this Court ruled that when the followers of a religious sect voluntarily enter into some activity that is subject to valid controls binding on all others engaged in such activity—seeking a land use permit would be a good example—that sect's religious beliefs offer no refuge from such governmental controls. That principle follows from a long line of decisions in this Court. *See, e.g., Reynolds v. United States,* 98 U.S. 145, 166-67 (1879) (polygamy laws); *Davis v. Beason,* 133 U.S. 333, 345 (1890) (bigamy laws); *Jacobson v. United States,* 197 U.S. 11, 26 (1905) (compulsory vaccination laws); *Prince v. Massachusetts,* 321 U.S. 158 (1944) (child labor laws).

B. The Court Of Appeals Reviewed The Zoning Regulation With The Deference Required In Due Process Cases.

Petitioners' remaining argument, that the conditions imposed violated their due process rights, must be viewed in light of this Court's admonition that courts should "refrain from reviewing [zoning decisions] absent a showing of arbitrariness or irrationality." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977). Since municipalities have broad authority to utilize land use regulation to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens, *see Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974), the legislative judgment involved in such regulation is to control "[i]f the validity of the legislative classification for zoning purposes be fairly debatable." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926).

As in those cases involving freedom of religion claims, the due process based cases relied upon by petitioners, in which zoning regulation by local governments was voided by the Court, involve *total* bans or prohibitions on the regulated activity. *Compare Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981) (outright prohibition on live entertainment within city limits) *and Schneider v. State of New Jersey,* 308 U.S. 147 (1939) (prohibition on distribution of printed matter on streets, sidewalks and in parks) *with Young v. American Mini Theatres, Inc.,* 427 U.S. 50, *reh. denied,* 429 U.S. 873 (1976) (less than total ban permissible).

Again, petitioners were never able to show this kind of burden or regulation. The remaining theory, that the imposition of conditions on the operation of a school "closely related" to the church *ipso facto* shifts the burden to the City to show compelling interest or that the regulations must be applied in the least restrictive manner, is simply a misstatement of the law. *See Lakewood,* 699 F.2d at 305-06 (consistent court of appeals decision upholding exclusion of churches from ninety percent of city under due process analysis).

C. The Case Involves No Issues Which Trigger This Court's Supervisory Authority.

Petitioners contend that the Fourth Circuit decision "is an extreme departure from the accepted and usual course of judicial proceedings" (Pet. at 25) because the court below "failed to address" many of the issues raised by First Assembly (Pet. at 23) and because the courts below rejected facts asserted by the First Assembly which compelled resolution in their favor. None of these contentions need detain the Court.

Petitioners' appeal to the Court's "supervisory powers" mirrors their claim before the court of appeals that the district court violated the rules of procedure by failing to accept their factual assertions and by failing to make specific findings of fact. Their assertion of error is wrong in any event because, rendering summary judgment, the court specifically was relieved from making the showing petitioners seek. *Lea v. Cone Mills Corp.,* 467 F.2d 277 (4th Cir. 1977). However, even if

that were not the case, "[t]he failure of the Court of Appeals to correct the errors of the District Court . . . ," with respect to factual assertions, does not constitute an extreme departure from accepted judicial procedure such that the exercise of any supervisory power is warranted. The Court has made clear that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Petitioners cannot identify any overiding principle of federal jurisdiction, *see, e.g., McNabb v. United States,* 318 U.S. 332, 341 (1943) (administration of federal criminal justice system); *Zahn v. International Paper Co.,* 414 U.S. 291, 296 (1973) (supervising class action), which is affected by the court of appeals decision and which rises to the level of this Court's review.

II.

PETITIONERS ARE ESTOPPED FROM CHALLENGING A ZONING SCHEME, THE BENEFITS OF WHICH THEY HAVE TAKEN FOR TWENTY YEARS, AND PERMIT CONDITIONS WHICH THEY SUGGESTED THEMSELVES.

Still another reason to deny the petition is to prevent petitioners from taking unfair advantage. Respondents raised in both the district court and court of appeals the argument of estoppel. As pointed out earlier, petitioners have taken advantage of the City's zoning laws for over twenty years. They sought and were given permits to build the church building in 1963, to build an extension in 1973, and to operate a school in 1982 (Pet. at 3-4). In addition, with respect to the specific permit in question, petitioners were granted their permit, accepted it, and began operating its school for two months before deciding to violate those conditions they unilaterally deemed improper. A party should not be able to take all the advantages of the City's zoning system and then, because of its opposition to two of twelve conditions, be able to attack its validity. As this Court has stated, petitioners "cannot claim the benefits of statutes and afterwards successfully assert their invalidity." *Wall v. Parrot Silver & Cooper Co.,* 244 U.S. 407,

412 (1917); *see also Ashwander v. TVA,* 297 U.S. 288, 348, *reh. denied,* 297 U.S. 728 (1936) (Brandeis, J. concurring). The fact that petitioners' challenge includes constitutional claims does not change this basic principle of fairness. *Wall,* 244 U.S. at 412.

Were this general principle not sufficient, petitioners even more outrageous challenge is to conditions which, in some cases, they suggested the City adopt. Certainly these conditions should be immune from petitioners' attack. *See County of Imperial v. McDougal,* 19 Cal. 3d 505, 564 P.2d 14 (1977), *appeal dismissed for want of substantial federal questions,* 434 U.S. 944 (1977).

CONCLUSION

Consequently, for the foregoing reasons, the petition for writ of certiorari should be denied.

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No. 84-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,
Petitioners,

v.

CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The basis of the opposition to the petition for certiorari in this case is the City of Alexandria's claim that no fundamental tenets of faith were infringed by the city's imposition of conditions on the school which the First Assembly of God Church seeks to operate. The essence of First Assembly's tenets of faith, and those of the plaintiff parents, and the extent of the interference with such beliefs are factual questions which make the disposal of this litigation on the basis of a summary judgment motion improper. The issue before this Court is not whether the lower courts should have resolved the factual disputes in favor of the Church, but whether the lower courts were required to allow the Church the opportunity to demonstrate the impact of the city's zoning ordinance on its religious beliefs.

I. CONTRARY TO RESPONDENTS' ARGUMENT, THE CHURCH DID RAISE GENUINE ISSUES OF MATERIAL FACT WHICH NECESSITATED THE DENIAL OF THE SUMMARY JUDGMENT MOTION

In deciding a motion for summary judgment, a trial court must determine whether "there is no genuine issue as to any material fact." Fed. R. Civ. P. No. 56(c). A court has no discretionary power to grant a summary judgment motion where the adjudication does involve disputed facts. It is not the function of the trial court to resolve any existing factual issues on summary judgment and thus "the inferences to be drawn from the underlying facts contained in [the pleadings and supporting documents] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Even where basic facts are undisputed, if the parties disagree regarding the material inferences which properly may be drawn from those facts, then summary judgment is improper. *Morrison v. Nissan Motor Co. LTD*, 601 F.2d 139, 141 (4th Cir. 1979). The granting of a summary judgment motion is particularly inappropriate where the resolution of an issue is dependent on the credibility or state of mind of witnesses. *Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977), citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

In its complaint, in its presentations to both the federal District Court and the Court of Appeals, and in its petition to this Court, the Church has consistently asserted that the operation of a weekday school at the Church site in furtherance of its ministry is a fundamental tenet of its faith. *See, e.g.*, Petition at 16-17.[1]

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[1] Despite the city's characterization, First Assembly is not asserting "any religious belief regarding the size of school populations or noise abatement, [or] privacy fences." Respondents' Brief in Opposition at 2. Indeed, the Church has never claimed a right to operate a school free from reasonable regulations imposed by the city.

In an attempt to shed doubt on the existence or sincerity of the Church's beliefs, the city has pointed to the absence of any written description in the Church's "Statement of Fundamental Truths" and the fact that some Church members have sent their children to public schools. *See* Respondents' Opposition at 2-3. While these facts are not in dispute, they in no way support the city's conclusion that the Church's assertions as to its beliefs are insincere.[2]

The strength with which the Church and its adherents hold their beliefs with respect to the operation of the Church school is a question of fact which is central to the claim of infringement of religious rights and is one which can only be decided after an inquiry into believers' state of mind and the credibility of their testimony at trial. Thus, because the Church and the city disagree with respect to the material inferences to be drawn from certain facts, the District Court erred in granting the city's motion for summary judgment and the Fourth Circuit failed to correct this error. These errors are particularly glaring because they served to deny to the Church and its followers their fundamental rights to the free exercise of religion.[3]

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[2] The Church and its followers rely on the teachings of the Bible as the basis for their conviction regarding the education of their children at the Church's weekday school. In *Thomas v. Review Board of the Indiana Employment Security Division*, where Mr. Thomas also rested his actions on his interpretation of scripture, this Court held that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." 450 U.S. 707, 715 (1981). The Court concluded that "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716.

[3] The city argues that this Court, by in the past dismissing certain appeals for want of a substantial federal question, "has indicated that zoning laws harsher than those in this case . . . do not violate the First Amendment . . . ." Respondents' Opposition at 7 n.1. In the cases cited by the city, however, the courts upheld

In seeking review of the Fourth Circuit's affirmance of the District Court's granting of summary judgment, First Assembly is not simply asking this Court to weigh the evidence or to correct harmless errors of procedure. *See* Respondents' Opposition at 8 n.2, 11. The courts below, by ignoring the Church's factual assertions regarding the burden imposed on its fundamental tenets of faith, not only violated the Church's procedural rights, but also denied the Church its substantive right to the free exercise of religion. Because this case involves serious First Amendment issues and thus raises an "overriding principle of federal jurisdiction" (Respondents' Opposition at 11), this case warrants the exercise of the supervisory powers of this Court.[4]

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the validity of the zoning ordinances because they were designed to promote the public health, safety, and welfare. In the instant case, the justification the city offers for its zoning ordinance is insufficient in light of the fact that only private schools, not public schools, are subject to the special use permit (SUP) requirement in order to operate in a residential zone. *See* Petition at 18 n.9. While the city claims an interest in noise control and traffic safety around schools, the fact remains that public schools may operate in a residential zone without an SUP and without any restrictions on playground activities, fence and shrubbery borders, or student enrollment.

[4] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court held that statutes granting government benefits to private schools raise significant First Amendment issues, despite their facial neutrality. Similarly, this case, involving as it does a government *restriction* on private schools, raises questions of religious freedom which are equally important. Thus, when a school is "substantially religious" so as to be ineligible for governmental financial assistance under the Establishment Clause, the school must also be considered sufficiently a part of a religious institution as to warrant protection under the Free Exercise Clause. *See Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112, 1119 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 490 (1979).

II. RESPONDENTS' CLAIM OF ESTOPPEL AMOUNTS TO AN ASSERTION OF TOTAL IMMUNITY FROM JUDICIAL REVIEW OF ANY APPLICATION OF A ZONING ORDINANCE

In its petition, the Church asserted that certain of the conditions imposed by the city on the operation of its Church school were invalid.[5] The city, however, claims that because the Church has received the benefits of the zoning ordinances, such as building permits, and has sought to comply with the special use permit (SUP) requirement, the Church cannot now be heard to complain that the conditions imposed on its SUP are unreasonably restrictive. Respondents' Opposition at 11-12. Thus, using the city's argument, all SUP applicants must accept *whatever* conditions the city imposes: the mere fact that a person applies for an SUP constitutes a waiver of judicial review, as well as a waiver of constitutional rights. Such unlimited authority has no support in the law.

Moreover, the city argues that the Church should be estopped from challenging the conditions which the Church itself suggested. While the Church did suggest certain restrictions in an effort to obtain an SUP (*see* Petition at 7 n.3 and Petitioners' Appendix (App.) at 15a-16a), the conditions actually imposed by the city are either materially different from those proposed by the Church or are excessive for the stated purposes of promoting noise control, traffic safety, and community tranquillity. For example, the Church stated in its SUP application that no more than 25 children would be allowed outside at one time in order to reduce noise. Petitioners' App. 15a. In addition to this condition, the city proceeded to impose the further restriction that a fence and shrubbery border be constructed for noise control and the patently absurd requirement that the 25 children allowed

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[5] The Church is not challenging all of the conditions imposed and in fact explained its compliance with many of those conditions. *See* Petition at 7 n.4.

outside could not engage in any noise generating activities. *Id.* at 29a.

The "basic principle of fairness" (Respondents' Opposition at 12) which the city invokes is nothing more than a claim of unfettered discretion in imposing SUP conditions. As such, the city's estoppel argument is without merit.

CONCLUSION

In granting and upholding the city's summary judgment motion, the lower courts improperly rejected the Church's factual assertions regarding its fundamental beliefs. Because the SUP conditions do interfere with the Church's religious beliefs, the lower courts were required to weigh that interference against the city's interest in imposing the conditions and to determine if they were the least restrictive means of achieving the city's goals. The lower courts' failure to make these findings denied to petitioners their fundamental constitutional rights. For these reasons, and for those discussed in the Church's petition, the decision of the Court of Appeals for the Fourth Circuit should be reviewed by this Court.

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